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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 105.

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

BRIEF IN OPPOSITION.

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TABLE OF CONTENTS.

PAGE

Certiorari should be denied because there are no special or important questions involved 1

TABLE OF CASES.

Bay State Dredging & Contracting Co. v. *Porter*, 1946, 153 Fed. 2d 827 5

Bonici v. *Standard Oil*, 103 Fed. 2d 437; 1949 A. M. C. 583, certiorari denied 5

Garrett v. *Moore-McCormack*, 317 U. S. 239 ..... 1, 4, 5, 8

German v. *Carnegie*, 169 Fed. 2d 715 5

Haddock v. *North Atlantic & Gulf*, 81 Fed. Sup. 421 5

Johnson v. *United States*, 186 Fed. 2d 120 5

Kelcey v. *Tankers Company*, 217 Fed. 2d 541 5

McAllister case, 348 U. S. 19 2

McGraw v. *States Steamship Company*, 1954 A. M. C. 148 7

Muruaga v. *United States*, 172 Fed. 2d 318 5

Sitchon v. *American Export Lines*, 113 Fed. 2d. 830, 1940 A. M. C. 1298; certiorari denied 1940 A. M. C. 1672 6

The Montague, 53 Fed. Sup. 548 5

The Francis Parkman, 80 Fed. Sup. 22 5

United States v. *Johnson*, 160 Fed. 2d 794 4

Water v. *United States*, 191 Fed. 2d 212 5

STATUTES.

Federal Rules of Civil Procedure, Revised Rules of Supreme Court,

Rule 19 1

Rule 52 2

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BRIEF IN OPPOSITION.

Certiorari should be denied because there are no special or important questions involved.

Rule 19 of the Revised Rules of the Supreme Court of the United States specifically points out that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The sole question involved is the validity of the seaman's release. The applicable law, as summarized by this Court in *Garrett* v. *Moore-McCormack*, 317 U. S. 239, is as follows:

> "We hold, therefore, that the burden is upon one who sets up a seaman's release to show that *it was* executed freely, without deception or coercion, and that *it was* made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal

advice available to the seaman *at the time of signing the release* are relevant to an appraisal of this understanding." (Emphasis supplied.)

These principles were expressly set out by the Third Circuit Court of Appeals in its opinion holding the release valid (9-a of petitioner's appendix). That Court then applied the facts, as determined by the District Court, to the established rule and held the release valid as a matter of law. The decision of the Third Circuit is not in conflict with any other Circuit, has not departed from the applicable decisions of this Court, and has not departed from the accepted and usual course of judicial proceedings.

Before going into the matter of release, petitioner's argument that the Circuit Court of Appeals made a new determination of acts in violation of Rule 52 of the Federal Rules of Civil Procedure and the decision in the *McAllister* case, 348 U. S. 19, should be dispensed with. The Third Circuit Court of Appeals made no new determination of the facts. It took the facts as determined by the District Court, but arrived at a different conclusion of law, that the release was valid. Whether or not the existence of certain determined facts constitutes mistake, misrepresentation or overreaching, is a question of law.

The petitioner summarized the case generally in his petition. The important facts in the record relied upon by the Circuit Court of Appeals to uphold the release were:

1. The seaman, after his discharge from the United States Marine Hospital where he was treated for the injuries sustained, voluntarily called upon the owner's agents and opened settlement discussions. At the time he was equipped with his discharge slip from the Marine Hospital (Appellant's Appendix to Circuit Court 203-a).

2. During his 3½ months period of hospitalization, the seaman had rejected the services of some 12 to 16 attorneys (Appellant's Appendix to Circuit Court 248-a), and expressly indicated his intention to handle his claim himself in nine letters written to the Company (Appellant's Appendix to the Circuit Court 338-a and 346-a).

3. The seaman's discharge slip from the United States Marine Hospital, given about a month prior to signing the release, indicated that he would be fit for duty in about one month. No prediction was made of any permanent disability (Appellant's Appendix to the Circuit Court 319-a).

4. The Marine Hospital was a neutral and independent medical expert.

5. The seaman was never refused maintenance, but on the contrary, requested and received an advance to take private treatment at Hot Springs, Arkansas (Appellant's Appendix to Circuit Court 203-a and 204-a).

6. Dr. Farr, who examined for the shipowner and whose findings were related to petitioner prior to signing the release, predicted a longer recuperating period than the Marine Hospital, namely, three months, and also estimated there would be a partial, permanent disability of 10% (Appellant's Appendix to Circuit Court 158-a and 159-a).

7. No medical evidence was offered at the trial by the seaman that he was permanently disabled more than 10%.

8. The seaman returned to work one month ahead of Dr. Farr's prediction and has been steadily employed up to the present time at ratings both below and above his

rating at the time he was injured (Appellant's Appendix to Circuit Court 334-a).

9. The seaman, William Thompson, had previously negotiated releases (Petitioner's Appendix 10-a).

10. While the District Court held there was a misrepresentation by the claim agent when he told the petitioner that he had a case of questionable liability (there being no notice of vicious propensities, and the *Keen* decision not having been rendered, 194 Fed. 2nd 515), the Circuit Court felt that even if the situation was one of liability, $4,000.00 was adequate in that petitioner earned $248.00 a month and was disabled only 4½ months.

11. While the seaman was hospitalized subsequent to his signing his release, it was principally for causes completely unrelated to the accident of January 13, 1950; For instance, from February 16 to April 20, 1951, he was treated for a duodenal ulcer and urethritis; From June 11, to July 1, 1951, at the Baltimore Marine Hospital, he was treated for kidney trouble; From February 13 to March 3, 1952 at Stapleton, Staten Island he was treated for a penal sore and a duodenal ulcer; From March 28 to April 9, 1952 at the Baltimore Marine Hospital, he received a prostate operation (Appellant's Appendix to Circuit Court 321-a to 326-a).

A review of the following release cases indicates that both the Circuit Court and the District Courts have been most able in applying the rule of the *Garrett* case without review by this Court. For instance, in the *United States* v. *Johnson,* 160 Fed. 2d 794, the Circuit Court said, in holding the release invalid:

> "Measured by the yardstick, established by the Supreme Court, previously quoted from *Garrett* v. *Moore McCormack, supra,* this release cannot stand

> because it was not 'made by the seaman with full understanding of his rights'."

No one fact is used to determine whether a release is valid or invalid. The latter Courts have considered all the facts and then determined whether the release was adequate, executed freely and understandably, with sufficient medical and legal advice available. Also see:

Bay State Dredging & Contracting Co. v. *Porter,* 1946, 153 Fed. 2d 827;
German v. *Carnegie,* 169 Fed. 2d 715;
Muruaga v. *United States,* 172 Fed. 2d 318;
Johnson v. *United States,* 186 Fed. 2d 120;
Water v. *United States,* 191 Fed. 2d 212;
Kelcey v. *Tankers Company,* 217 Fed. 2d 541;
The Montague, 53 Fed. Sup. 548;
The Francis Parkman, 80 Fed. Sup. 22;
Haddock v. *North Atlantic & Gulf,* 81 Fed. Sup. 421.

Interesting language with respect to releases is contained in two Circuit Court decisions where certiorari was denied prior to rendering an opinion in the *Garrett* case.

In *Bonici* v. *Standard Oil,* 103 Fed. 2d 437; 1949 A. M. C. 583, certiorari denied, The Court said:

> "Hence, while 'one who claims that a seaman has signed away his rights to what in law is his due must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman,' (Harman *v.* U. S., 5 Cir., 59 F. 2d 372, at p. 373), nevertheless, a release fairly entered into and fairly safeguarding the rights of the seaman, should be sustained. Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's stand-

> point and thus tend to force the seaman more regularly into the courts of admiralty. Even if a seaman is the court's ward, the court cannot be always at hand to watch over him, for it can only move ponderously in a formal law suit. Fair settlements are in the interest of the man, as well as of the employers. This conclusion is substantiated by the fact that Congress when it legislated as to one form of releases, namely those for wages, nevertheless did so on the basis that the release was good until set aside, for it provided that 'any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require' (Act of March 4, 1915, chap. 153, Sec. 4, 38 Stat., 1164, 1165, 46 U. S. C. A., Sec. 597; *Pacific Mail Steamship Co.* v. *Lucas*, 258 U. S. 266)."

In the second case, *Sitchon* v. *American Export Lines*, 113 Fed. 2d 830, 1940 A. M. C. 1298; certiorari denied 1940 A. M. C. 1672, the Court said:

> "If such a settlement as the one in the case at bar is voidable, no release by a seaman could ever be free from attack, if he subsequently discovered that his injuries were greater than he anticipated when executing the release.
>
> "When a seaman has made a settlement after full investigation and with independent advice, we can see no ground for holding it invalid. The question in any case is whether the seaman, if he is acting alone, has intelligence enough to fully understand the situation and the risk he takes in giving up the right to prosecute his claim, or whether, if he is acting under advice, that advice is disinterested and based on a reasonable investigation."

An interesting comment by a lower Court in a situation where the medical condition of a seaman changed for the

worse after the signing of the release is *McGraw* v. *States Steamship Company*, 1954 A. M. C. 148:

> "The evidence at the trial establishes the fact that libellant took the initiative in suggesting a settlement. In the light of the known medical history at the time, there was no overreaching on respondent's part. Libellant McGraw, himself, obtained the abstract of the clinical record from the Marine Hospital which showed that the libellant was then suffering from painless gross hermaturia—etiology unknown. This record was further substantiated by the report from the Bluff Hospital, Yokohama, Japan, which was known to both parties.
>
> "On February 21, 1952, based on the Marine Hospital report and that of the Bluff Hospital, libellant was paid maintenance to and including February 28, 1952, together with his unearned wages and transportation.
>
> "Dr. Berger of the Marine Hospital confirmed the clinical reports, through a telephonic communication to the office of the claim agents, at which time libellant was present. Respondent was in no better position to determine the clincial or medical facts than was libellant and the future of the course of the case from a medical viewpoint was problematical and in the realm of speculation. The apparent kidney ailment might have corrected itself in a matter of weeks.
>
> "Based on the information in possession of both parties, the settlement was a fair one and the consideration was adequate. Subsequent developments showing the need for extended medical treatment and care, were not anticipated by either party and do not control in determining the validity of the release. Any financial pressure which libellant was under at the time of settlement was not known to respondent's representative."

From the preceding, it will appear that the Circuit Court for the Third Circuit made a proper application of the *Garrett* rule in upholding the release entered into by Thompson. There is nothing unusual about the *Thompson* case.

WHEREFORE, it is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement of the Case	4
Summary of Argument	12
ARGUMENT:	
I—This seaman was a ward of admiralty without legal or medical advisers, and defendant was obliged to correctly explain to him, so that he would correctly and fully understand, both his legal rights and the extent of his disability and damage, and to pay him a consideration reasonably adequate to satisfy his rights. The risk was on defendant that the representations made by its agents in procuring the release should prove to be erroneous and the amount of the settlement inadequate	14
II—Defendant was liable for petitioner's damages, and the District Court correctly held that defendant's representation to the contrary misrepresented the law	19
III—The District Court correctly held the release invalid and the Court of Appeals erred in reversing. Not only is the reversal contrary to the wardship theory of the maritime law; it is more harsh than decisions invalidating releases or other contracts between equals dealing at arm's length	24
IV—Unseaworthiness, mistake, misrepresentation, and invalidity of the release, were all questions of fact determined by the District Court in petitioner's favor. Under Rule 52 the findings and judgment could not be set aside because not clearly erroneous	30
CONCLUSION	31

Cases Cited

PAGE

Aguilar v. Standard Oil Co., 318 U. S. 724 16
Alpha Steamship Corp. v. Cain, 281 U. S. 642 .....20, 21

Bambridge v. Merchants & Miners, 287 U. S. 278 14
Berry v. American Central Ins. Co., 132 N. Y. 49 29
Bomba v. Borowicz, 2d Dept., 265 N. Y. App. Div. 198 21
Bonici v. Standard Oil Co., 2d Cir., 103 F. 2d 437, cert. denied, 308 U. S. 560, 636 17
Boudoin v. Lykes Bros. Steamship Corp., 348 U. S. 336 .....22, 23, 30

Callen v. Penn. R. R. Co., 332 U. S. 6 .....26, 28, 30
Camerlin v. Union Pac. R. R. Co., 2d Cir., 196 F. 2d 50 26
Carib Prince, The, 170 U. S. 655 30
Chesapeake & Ohio R. R. Co. v. Howard, 178 U. S. 153 .....26, 30
Ciletti v. Union Pacific R. R. Co., 2d Cir., 196 F. 2d 50 26
Clark, The Case of Mary, 1 Blackf. (Ind. S. C.) 122 .. 15
Clyatt v. U. S., 197 U. S. 207 15
Cortes v. Baltimore Insular Line, 287 U. S. 367 ..14, 15, 16

Dice v. Akron, Canton & Youngstown R. R. Co., 342 U. S. 359 30

Fletcher v. Baltimore & Potomac R. R. Co., 168 U. S. 135 .....19, 20

Garrett v. Moore-McCormack Co., 317 U. S. 239, revg. 344 Pa. 69, 23 A. 2d 503 .....4, 14, 15, 16, 17, 25, 30

Hardin v. Gordon, 2 Mason 541, Fed. Cases No. 6047..14, 16
Hudson v. Glens Falls Ins. Co., 218 N. Y. 133 29
Hume v. Moore-McCormack Lines, 2d Cir., 121 F. 2d 236 17

Isbrandtsen Co. v. Johnson, 343 U. S. 779 .....14, 15

Jamison v. Encarnacion, 281 U. S. 635 .....20, 21
Johnson v. U. S., 333 U. S. 46 .....20, 21

Keen v. Overseas Tankship Corp., 2d Cir., 194 F. 2d 515, cert. denied 343 U. S. 966 .....22, 23
Kelcey v. Tankers Co., Inc., 2d Cir., 217 F. 2d 541 17

PAGE

Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U. S. 139 30

McAllister v. U. S., 348 U. S. 19 .....30, 31
Mahnich v. Southern Steamship Co., 321 U. S. 96 30
Michoud v. Girod, 4 How. (45 U. S.) 503 17

Nordpol, The, 2d Cir., 84 F. 2d 3, cert. denied 299 U. S. 586 23

Patterson v. Bark Eudora, 190 U. S. 169 15
Peninsular & Occidental S. S. Co. v. N. L. R. B., 5th Cir., 98 F. 2d 411 23
Pope & Talbot v. Hawn, 346 U. S. 406 17
Propeller Niagara, The v. Cordes, 21 How. (62 U. S.) 7 23

Robertson v. Baldwin, 165 U. S. 275 .....14, 15
Rolph, The, 9th Cir., 299 Fed. 52 23

Scheer v. Rockne Motors Corp., 2d Cir., 68 F. 2d 942 26
Seas Shipping Co. v. Sieracki, 338 U. S. 85 17
Southwark, The, 191 U. S. 1 23
Steel v. State Line S. S. Co., L. R. 3 A. C. 72 30
Steeley v. Kurn, 313 U. S. 545 21
Steeley v Kurn, 347 Mo. 74, 146 S. W. 2d 598 21
Steeley v. Kurn, 348 Mo. 1142, 157 S. W. 2d 212 21
Stuart v. Alcoa, 2d Cir., 143 F. 2d 178 17

Texas & Pacific Ry. Co. v. Dashiell, 198 U. S. 521 26
Texas Co. v. N. L. R. B., 9th Cir, 120 F. 2d 186 23
Thompson v. Coastal Oil Co., S. D. N. Y., 119 F. Supp. 838 22
Titus v. Rochester German Inc. So., 97 Ky. 567 29

Union Pacific R. R. Co. v. Harris, 158 U. S. 326 ..26, 30, 31
U. S. v. Brig Malek Adhel, 2 How. (43 U. S.) 210 ... 20
U. S. v. Reynolds, 235 U. S. 133 15

Warner v. Goltra, 293 U. S. 155 14
Wheeler v. Smith, 9 How. (50 U. S.) 55 .....28, 29
W. J. McCahan Sugar Refining Co. v. S. S. Wildcroft, 201 U. S. 378 30

Statutes Cited

PAGE

17A McKinney's Con. Laws (N. Y.), § 2, par. 2 ... 21

18 U. S. C. § 2191, formerly 46 U. S. C. § 712 20

18 U. S. C. § 2196, formerly 46 U. S. C. § 704, R. S. § 4602 .....2, 3, 20

45 U. S. C. § 51, Sec. 1 of the Employers' Liability Act, 35 Stat. 65, amended 53 Stat. 1404 2

46 U. S. C. § 653, R. S. § 4556 23

Rule Cited

Rule 52, Federal Rules of Civil Procedure 31

Treatises Cited

Kerr on Fraud and Mistake, 5th Ed., 519-520 28

3 Pomeroy's Equity Jurisprudence, 5th Ed., § 953a, pages 783, 784 18

4 Pomeroy's Equity Jurisprudence, 5th Ed., § 1083, page 1089 18

Restatement of Agency, § 390 18

2 Restatement of Contracts, §§ 474, 500, 502 .....27, 29

Restatement of Restitution:

Topic 3, Introductory Note, pages 180-181 .....28, 29

§ 6 27

§ 11 .....18, 27

§ 19 27

§ 55 .....18, 20, 28, 29

§ 191 18

PAGE

3 Restatement of Torts:

§ 542 (a), (b), (c), (d) and Comment d under clause (c) 27

§ 545 29

Restatement of Trusts:

§ 170(2) 17

§ 216(2) 17

§ 217(2) 18

40 Va L. Rev. 610-620 21

5 Williston on Contracts, Revised Ed., § 1500 27

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the United States District Court, District of New Jersey, Richard Hartshorne, D. J., (R. 14a-27a; Appendix to Petition pp. 13a-25a) is reported in 119 F. Sup. 838 and 1954 A. M. C. 1190.

The original opinion of the Court of Appeals for the Third Circuit (Appendix to Petition pp. 6a-12a) and the opinion of that court *en banc* on motion for rehearing and the dissenting opinion by Chief Judge Biggs and Judge McLaughlin (Appendix to Petition pp. 1a-3a) are reported in 221 F. 2d 559.

Jurisdiction

The decision and judgment of the Court of Appeals was entered January 28, 1955 (Appendix to Petition pp. 3a-4a). By order made February 28, 1955 said Court of Appeals recalled the mandate and extended the time for filing a petition for rehearing to March 15, 1955 (Appendix to Petition p. 4a). A timely petition for rehearing was filed on March 12, 1955; and on April 22, 1955 said Court denied rehearing (Appendix to Petition p. 5a) with two judges dissenting and rendering a dissenting opinion (Appendix to Petition pp. 1a-3a). The petition for certiorari was filed May 28, 1955, and was granted October 10, 1955. On November 14, 1955, this court made an order granting petitioner's motion to waive the printing of the record. The jurisdiction of this court is found in 28 U. S. Code, Sections 1254(1) and 2101(c).

Statutes Involved

The statutes involved, Section 33 of the Jones Act, 41 Stat. 1007, 46 U. S. Code § 688; § 1 of the Employers' Liability Act, 35 Stat. 65 amended 53 Stat. 1404, 45 U. S. Code § 51, and statute respecting willful breach of duty by a seaman, 18 U. S. Code § 2196, formerly 46 U. S. C. § 704, R. S. § 4602, are as follows:

46 U. S. C. § 688. Recovery for injury to or death of seaman.—Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury and in such action all statutes of the United States conferring or

regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

45 U. S. C. § 51. Every common carrier by railroad while engaging in commerce between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or territories and any foreign nation or nations shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees, of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

18 U. S. C. § 2196. Drunkenness or neglect of duty by seamen— Whoever, being a . . . seaman . . . or other person employed on any merchant vessel, by willful breach of duty . . . does any act . . . tending immediately to endanger the life or limb of any person belonging to or on board of such vessel . . . shall be imprisoned not more than one year.

Questions Presented

Whether the District Court properly set aside the seaman's release herein and rendered judgment for plaintiff's damages, and the Court of Appeals erred in reversing.

Petitioner presents as subsidiary questions those numbered 1 to 6 in the petition (pp. 3-4) and those which petitioner stated that petitioner proposed also to argue in the event that the writ was granted (Petition, p. 4).

See the more detailed statement of these questions in the petition (pp. 3-4).

Statement of the Case

The action is by a seaman, under the Federal Maritime Law and statutes relating to seamen for damages sustained by him from a murderous assault committed on him on shipboard by another seaman with a meat cleaver, wherein the District Court held a release executed by the seaman invalid and awarded the seaman damages, and the Court of Appeals reversed on the ground that the release was binding. Rehearing motion considered by the court of seven judges *en banc* was denied, with two judges dissenting. The five judges who held the release binding (Judges Maris, Goodrich, Kalodner, Staley and Hastie) are judges from Pennsylvania; and the dissenting judges (Chief Judge Biggs and Judge McLaughlin) are from Delaware and New Jersey. Cf. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, revg. 344 Pa. 69, 23 A. 2d 503.

Petitioner was second cook on defendant's S. S. Rosina Marron. One Medina, a Cuban, was mess man. Medina was an effeminate "queer," called "Rosina" and other feminine names by all on board, including the Captain (Schiffer, Appendix for Appellee below, p. 48a).

On the night of January 12, 1950, seeking someone to play cards with, petitioner, upon opening the door to a room occupied by seamen Pittaway, Schopf and another, found Medina engaged in homosexuality simultaneously with Pittaway and Schopf (R. 77a, 212a, 213a, 215a). He reported this both to his superior, the Chief Steward, Schiffer and to the Union Delegate, Caplis (R. 76a).

Defendant's counsel admitted it was reported to the Steward (R. 211a). Schiffer testified it was reported to him by Thompson at about 5:30 A.M. on the morning of the 13th; that it was his duty to report it to the Captain; he reported it to the Captain at about 7:00 A.M., just before breakfast, and the Captain said Medina had reported it himself to the Captain (Appendix for Appellee below, pp. 50a-53a). Schiffer considered perverts danger-

ous (*Id.*, 55a, 66a). Caplis testified that at about 1:00 or 1:30 in the afternoon Medina stated he was going to kill Thompson (*Id.*, 31a-32a). Caplis did not consider homosexuals appropriate shipmates (*Id.*, 33a).

Even before the 12th, report had been made to the Steward that Medina went around kissing fellows and that he was not fit to be waiting on the crew and not fit to be a member of the crew (R. 209a). Schiffer testified he had observed this some two months before the accident (Appendix for Appellee below, 44a-45a).

On the evening of January 13, 1950 a meeting called by Union Delegate Caplis was held, attended by (among others) Medina, Pittaway, Schopf and petitioner, as the parties to be questioned on the report. Pittaway and Schopf did not admit the act, wanted it not to be reported, and offered to leave the ship at the next port. But Medina left the meeting earlier than the others, got a meat cleaver from the galley, and as petitioner and others were leaving along a dark passageway, he struck petitioner three times over the head with the meat axe, in an attempt to kill him (R. 83a-84a).* Petitioner was treated in the ship's hospital (R. 86a) and on arrival on Sunday, January 15, 1950 at Corpus Christi was removed from the ship and taken to a hospital (R. 87a-88a; 222a-223a). He underwent subsequent extended treatment in Marine Hospitals at Galveston, New Orleans and Stapleton.

While in the hospital at Corpus Christi he exchanged letters twice with defendant's agents, Sieling & Jarvis (R. 95a-99a). They had a local agent pay him $100 for transportation to New Orleans (R. 99a). While there he was subpoenaed for Medina's trial in Corpus Christi and took the trip as far as Houston, but got very sick and was sent by ambulance to the Marine Hospital at Galves-

* Medina was placed in irons and turned over to the Coast Guard on arrival at Corpus Christi (Appendix for Appellee below, pp. 28a, 64a) and later convicted and sentenced to prison.

ton, the trial being postponed because of his illness (R. 99a-100a). An agent called on him there and asked if he needed any money, but petitioner said he had enough to carry him along (R. 100a). The agent gave him a card and told him to call up Sieling & Jarvis if he needed any assistance.

While in the hospital at Galveston petitioner "went crazy" or "cracked up" and two days after this was sent to John Seeley Hospital to see a Specialist who gave him an electroencephalogram (described rather than named by petitioner), but told petitioner he was not permitted to tell him about his condition (R. 101a-102a). Later petitioner attended the trial at Corpus Christi and then came to the hospital at Stapleton (R. 102a), where he was sent to Ellis Island and given the same electroencephalogram test (R. 102a). He asked the doctor if he would "make the grade" and was told "Yes, you will make the grade"; but this doctor also told him he was not allowed to tell petitioner a thing (R. 102a).

The hospital records of both the Galveston Marine Hospital (R. 318a) and of the Stapleton Marine Hospital (R. 319a) show a diagnosis "Encephalopathy due to trauma".

While in Staten Island Marine Hospital he needed $50, and because Sieling & Jarvis had told him if he needed cash, to call them up, he did so and it was sent over right away (R. 103a).

He remained in the hospital until some three weeks before the settlement, and then defendant's agent, Mahoney, advanced him $300.00, which he used to go to Arkansas, where he took hot baths and came back feeling better (R. 103a-104a, 203a-205a) and discussed settlement with Mr. Mahoney and later with Barron. Mahoney told him the best they could offer was about $4,000.00, "because you are well" (R. 106a-107a), and defendant's Dr. Farr told him he was a well man (R. 107a).

Dr. Farr was hired by the ship owners to "make a report to them, to help them price the value of this case" (R. 165a). He was not a neurologist (R. 166a). He made a physical examination of petitioner in May of 1950, but was not sure that he saw at that time any hospital record showing a diagnosis of encephalopathy due to trauma, but has seen them since (R. 167a). He prescribed three months further convalesence period or until about August, 1950, and then a ten percent permanent disability (R. 159a). Yet, about a week before the trial, in 1954, when he examined him again, he found his complaints "almost identical with the previous ones" (R. 168a), and his conclusion was that in 1954 the seaman was "slightly better than he was in 1950" (R. 165a). Dr. Farr's 1954 examination showed still a faint line of vertical fracture and that the healing "has progressed quite satisfactorily but not completely" (R. 162a). He testified that the petitioner was not faking; he had symptoms when originally examined in 1950 "and I think the same symptoms are renewed" (R. 164a).

Dr. Somberg (petitioner's witness), who was a neurologist (R. 120a), testified that the fractured skull sustained in January, 1950 gave rise to organic brain disease, as the result of which plaintiff had an anxiety state bordering on schizophrenia; that the blows on the head with the meat cleaver were the producing cause of that brain disease (R. 124a-125a); and that the disability and pains would be throughout life (R. 130a).

Barron, the Claim Adjuster, saw petitioner twice at the instance of Sieling & Jarvis—before he went to Arkansas, and after he returned (R. 258a-259a). He had him examined by Dr. Farr, but did not have the doctor's report with him at the first conference (R. 259a-260a). The seaman wanted $15,000.00, but he thought he talked him down to $6,000.00 at the first meeting—without the doctor's report (R. 259a-260a). He had clinical abstract from the

hospitals (R. 264a), which showed in bold type "encephalopathy due to trauma", which he knew meant not just concussion, but brain damage (R. 265a), but testified:

> "Q. Did you discuss this encephalopathy with him? A. No, I don't believe I did" (R. 264a).

He read to the seaman "that portion of the report" from Dr. Farr that he would have ten percent disability with some two or three months further convalescence before returning to work (R. 260a). "I told him what the doctor told him, and that was it" (R. 262a).

He was familiar with the law in regard to liability, and didn't believe petitioner had a good case against the ship owners (R. 263a). He testified that in his understanding of the law at the time, "notice" of the assaulting man's vicious propensities was necessary to recovery (R. 275a). He told petitioner what his thoughts were as to the law, and that petitioner had "a weak case" (R. 264a 278a).

There was a brief period of maintenance, for out-patient treatment; and "we discussed the possibility, of course, that if he could not substantiate his claim he would be entitled to no more than the two hunderd dollars" (R. 261a).

Asked on cross-examination "How did you make up this four thousand dollars?", Barron testified that he estimated approximately $200.00 for maintenance and cure, and the loss up to that time of five or six months base wages and overtime at about $250.00, or maybe a little better a month, "so his total special damage could not have been more than two thousand dollars, at tops, if, of course, there was any liability at all"; if there was no liability he would be entitled to about $200.00 "and that would be it", and for purposes of settlement his special damages "would make it about two thousand dollars". Although he had talked petitioner down from Fifteen Thousand Dollars to Six Thousand Dollars, he stated (R. 266a-267a):

"Mr. Thompson, himself, gave a figure of six thousand dollars as a figure which he would be willing to take . . . So I pointed out to him that if he were to accept four thousand dollars in settlement he would probably be saving some money for himself because most attorneys, so far as I know, take at least one-third of any figure in settlement; some take forty percent; some take fifty, but the average runs to about a third, and if he were to take about four thousand dollars *he would be getting as much with four thousand as if he had retained an attorney and paid an attorney the other two thousand dollars*" (R. 267). . . .

"The Court: Well, then, to make a long story short, discounting the question of liability, discounting the attorney's fees, *both of which are substantial items,* you allowed him two thousand dollars for his disability, his brain disability, brain damage?

The Witness: If he had any" (R. 267a-268a) (Italics ours.)

Barron testified that it was not in his mind that two years before the trial petitioner would have to give up being a sea cook or a cook of any kind, but he expected him to continue going to sea as a cook (R. 272a). If he had known otherwise he would not have evaluated the case as he did (R. 272a-273a); he would not have allowed him to take the Four Thousand Dollars but would have told him to get a lawyer, because he was going to be a sick man (R. 274a). He testified that "I would have been mistaken if Dr. Farr's prognosis was wrong. My evaluation would have been other than it was", "And of the consideration" also (R. 271a); that he took Dr. Farr's word or report, and if that was incorrect he told Thompson that he was in a much less serious condition than he may now possibly be (R. 276a).

Petitioner testified that if he had known that he was to undergo suffering such as he had since signing the release,

he would have died before he would have signed it (R. 108a); and that "I would have never signed it because I keep going in and out of hospitals since" (R. 109a).

Due to the injury he had found it impossible to work as a ship's cook or second cook, because he couldn't work around the range, "and then I got to take the lowest job on the boat now, between a dishwasher or a galley utility, something that I get away from the range" (R. 113a). Even during trial, his head was bandaged from treatment of a Marine Hospital Doctor (R. 115a-116a), Dr. Farr having removed the bandage to make an examination just before the trial and replaced it with a bandage from Dr. Farr (R. 116a-117a).

The District Court, during Barron's testimony, indicated that, in view of the *Keen* case, there had been a mistake of law (R. 269a-270a), and at the Court's question Barron admitted that if Dr. Farr's prognosis was wrong, then since Barron had accepted that prognosis there had been a mistake of prognosis (R. 271a). To a question by the Court, Barron testified that his understanding of the law "now turns out to be wrong" and he "told Thompson wrong innocently", and he took Dr. Farr's word and "told Thompson that he was in a much less serious condition than he now may possibly be" and "therefore, told Thompson wrong as to the medical fact innocently", and he didn't know "what advice he got on the outside" (R. 276a-277a).

Petitioner testified that prior to the settlement "I didn't see any lawyer at all on the whole case. I was going by what Mr. Mahoney said, that he would do right by me"; when some lawyers approached him he told them that "No, I was going to the company, they promised to do good by me and I just don't want any lawyer" (R. 108a). "I had no lawyer, I was depending on them" (R. 110a).

Even the letters from petitioner to Mahoney, which defendant introduced to show that petitioner had been ap-

proached by attorneys, actually show the pitifully complete reliance of petitioner on Sieling & Jarvis and Mahoney: "I am sure when I get well they will take care of me the best they can . . ." (R. 198a). "Please keep my job for me. Thank you" (R. 198a-199a). "I told them I am still sick and don't want to talk to any lawyer. It is three months now since I got hurt. So many different ones come to try and get me to talk to them. I won't talk to or see anyone until I have seen someone from Sieling and Jarvis . . . Please let me hear from you soon so I can know what to do. Lots of guys are telling me different tales. I don't listen to them" (R. 201a). See Defendant's Exhibit No. 2—nine letters (R. 338a-346a, marked in evidence R. 201a).

The District Court found the vessel unseaworthy and the release invalid, and held defendant liable for an additional $16,000 damages. The Court found that there had been mistake and misrepresentation by defendant to the seaman of both his disability and his legal rights.

The Court of Appeals majority, in reversing, acknowledges "Encephalopathy due to tramua" (Appendix to Petition—p. 7a); that it is true that the petitioner did not have independent medical advice of his choosing; that Dr. Farr reported a 10% disability and that petitioner would not be able to work for three months; that during negotiations for the release petitioner was not represented by counsel (*Id.* p. 8a); "that Thompson had been told the success of his case was dependent upon a showing that the defendant had or should have had notice that Medina's presence created a risk of danger to the crew" (*Id.* p. 10a); that "Since the signing of the release, plaintiff has continued to suffer from the effects of the head blow, having been hospitalized" in 1952 and 1954, and is still receiving out-patient treatment; and that "it is patent that his injuries have proved more serious than was thought at the time of the release . . . True, the plaintiff is now known to have suffered to a greater extent

than was previously thought" (*Id.* pp. 8a-9a). But the Court of Appeals holds that he was not precluded from the procuring of counsel, having been deluged during his hospitalization with offers of legal service; that no coercion was involved (*Id.* pp. 10a-12a); and that any misrepresentation made "being grounded on available and honestly entertained opinion, cannot be made the basis for nullifying this settlement" (*Id.* p. 11a). By contrast, the two dissenting judges, on motion for rehearing, pointed out that Barron told Thompson that he had a weak case, both as to measure of damages and the law; that as a matter of fact Thompson had suffered more serious injury than was realized; he is a Negro with but slight formal education, who had suffered a severe head injury and had developed psychoses, and that "Barron's statement as to the status of the law was incorrect and if he did not know this he should have for no decided case lay against Thompson". "Barron made use of the sort of language which claim adjusters are accustomed to use when dealing with a claimant with whom they are entitled to negotiate at arms length. But Thompson was a seaman, a ward of the admiralty and it is clear, as the District Court found in substance, that he was overreached" (*Id.*, 2a-3a).

Summary of Argument

Petitioner being a seaman, the wardship theory applies. The burden was on defendant to prove that the release was made by the seaman petitioner for adequate consideration and with full understanding of his rights. This requires proof of full and correct understanding of his disability and of his legal rights and a payment adequate to cover his actual damage and rights. This would have been required even if defendant had made no representations to the seaman in procuring the release. But instead of defendant proving this, both parties proved and the

court found that the release was procured by representations, which proved to be misrepresentations made to the seaman by defendant's agents.

Defendant was liable for petitioner's injury and damage both under the Jones Act, and for unseaworthiness by reason of the presence on board, as a member of the crew, of Medina, a known pervert and "queer", who attempted to kill petitioner in a murderous assault with a meat cleaver. Such liability did not require proof by plaintiff that defendant had "notice" of his dangerous character; and defendant's agent Barron, by his own testimony, misrepresented to petitioner his legal rights and that he had a weak case, with only $200.00 maintenance likely to be recovered.

It was also represented to petitioner that he was practically well, and would be fit for work within three months, with only a 10% permanent disability; whereas four years later he was still disabled at time of trial. And after talking petitioner down from $15,000.00 to $6,000.00 by such representations, Barron—representing that petitioner would save money by settling without hiring an attorney and incurring an attorney's fee—then induced petitioner to further reduce the claim by one-third representing an attorney's fee.

The District Court's findings, both of unseaworthiness and of invalidity of the release, were findings of fact not clearly erroneous.

The Court of Appeals majority erred in holding the release binding; its judgment should be reversed and the judgment of the District Court should be reinstated and affirmed.

ARGUMENT

I

This seaman was a ward of admiralty without legal or medical advisers, and defendant was obliged to correctly explain to him, so that he would correctly and fully understand, both his legal rights and the extent of his disability and damage, and to pay him a consideration reasonably adequate to satisfy his rights.

The risk was on defendant that the representations made by its agents in procuring the release should prove to be erroneous and the amount of the settlement inadequate.

This Court has consistently held that seamen are a special class, unlike men who work ashore, and are to be treated by the courts as wards, whether in sustaining as constitutional stern laws for enforcing service discipline and punishment of seamen (*Robertson* v. *Baldwin,* 165 U. S. 275, 287 (1897), or in liberally construing laws made for benefit of seamen (*Bambridge* v. *Merchants and Miners,* 287 U. S. 278, 282 (1932); *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 377 (1932); *Warner* v. *Goltra,* 293 U. S., 155, 162 (1934); *Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779, 782, 783 (1952), or in invalidating contracts and releases made by seamen without adequate consideration and full understanding of their rights (*Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 246, 247 (1942); Mr. Justice Story at Circuit, in *Harden* v. *Gordon,* 2 Mason 541, Fed. Case No. 6047 (1823).

So exceptional is their status that, like children with their parents or guardians, the Thirteenth Amendment of the Federal Constitution prohibiting involuntary servitude

does not apply to their contracts of service. *Robertson* v. *Baldwin, supra,* 165 U. S. 275, 282-283, 288). Compare *The Case of Mary Clark,* 1 Blackf. (Ind. S. C.), 122, 125; *Clyatt* v. *U. S.,* 197 U. S. 207, 215; *U. S.* v. *Reynolds,* 235 U. S. 133, 144, holding that other servants have a constitutional right to break contracts of service.

For centuries seamen were treated as wards in the "admiralty" courts, which once exclusively administered the "maritime" law. Now, with law courts open also to many maritime disputes, this Court has held that they must be equally so treated in courts of "law" (*Garrett* v. *Moore-McCormack Co., supra,* 317 U. S. 239, 246, 247).

By Congress, Parliament, and the Courts alike, seaman as a class are treated

> "as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense which minors and wards are entitled to the protection of their parents and guardians . . . The ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly"
>
> *Robertson* v. *Baldwin, supra,* 165 U. S. 275, 287 (1897);
>
> *Cortes* v. *Baltimore Insular Line, supra,* 287 U. S. 367, 377 (1932);
>
> *Isbrandtsen Co.* v. *Johnson, supra,* 343 U. S. 779, 783 (1952).

All seamen by reason of the very nature of their calling, are inherently such as to be easily imposed upon (cf. *Patterson* v. *Bark Eudora,* 190 U. S. 169, 175, 176 (1903)). They work upon ships, mostly at sea, "with constant shuttling between unfamiliar ports", and are but temporarily in port (either domestic or foreign), unless during disability so invariably attended with poverty and

destitution that for centuries their maintenance and cure when suffering from injury, has been required of the shipowner under the laws of all the principal maritime nations of the world. *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 727 (1943).

As this Court said in *Cortes* v. *Baltimore Insular Line, supra,* 287 U. S. 367, 377:

> "The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This Court has said that the ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly".

In *Garrett* v. *Moore-McCormack Co., supra,* 317 U. S. 239, 246, 247, 248, this court, quoting Mr. Justice Story's holdings in *Harden* v. *Gordon, supra* (2 Mason 541, 11 Fed. Cases No. 6047) that seamen "are emphatically the wards of the admiralty"; that the same principles of equity apply to their contracts as in the cases of young heirs, wards and their guardians and *cestuis que* trust and trustees, specifically held that the burden is upon the one who sets up an injured seaman's release to prove its validity and not upon the seaman to establish its invalidity. This court further held:

> "We hold, therefore, that the burden is upon one who sets up a seamen's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman *with full understanding of his rights.* The *adequacy of the consideration* and the nature of the *medical and legal advice* available to the seaman at the time of signing the release are relevant to an appraisal of this understanding" (317 U. S. 248). (Italics ours.)

This court held that the seamen's right in this respect "was a part of the very substance of his claim" and ap-

plicable in a law action as well as in admiralty (317 U. S. 249). The substantive rights of a person injured on board a vessel are not to be determined differently, whether his case is labeled on the law side or admiralty side of a Federal District Court docket. (*Pope & Talbot* v. *Hawn*, 346 U. S. 406 (1953); *Seas Shipping Co.* v. *Sieracki*, 338 U. S. 85, 88, 89 (1946).

The same wardship principles were applied respecting seamen's releases in *Bonici* v. *Standard Oil Co.*, 2d Cir., 103 Fed. 2d 437 (1939); cert. denied, 308 U. S. 560, 636; *Hume* v. *Moore-McCormack Lines*, 2nd Cir., 121 Fed. 2d 236 (1941); *Stuart* v. *Alcoa*, 2nd Cir., 143 Fed. 2d 178 (1944), and *Kelcey* v. *Tankers Co., Inc.*, 2nd Cir., 217 Fed. 2d 541. Both the *Bonici* and *Stuart* cases involved the fact, such as the District Court herein found, that the disability was considered less serious at the time the release was given than it eventually turned out to be, and that the consideration paid was inadequate for the disability which actually existed.

As the opinion in *Garrett* v. *Moore-McCormack Co., supra*, shows, its requirement that the release be made by the seaman "with full understanding of his rights", for adequate consideration, and upon proper advice, is in accord with the law affecting trustees and beneficiaries. This court cited *Michoud* v. *Girod*, 4 How. (45 U. S.) 503, 556.

Restatement of Trusts, § 170(2) says that a trustee dealing with a beneficiary on the trustee's account must communicate to the beneficiary all material facts "which the trustee knows or *should know*." Section 216 (2) with reference to consent of beneficiary and § 217 (2) with reference to discharge of liability by release or contract further emphasize these requirements. Sub-paragraph (b) under both Sections shows that a consent or release is not effective if the beneficiary did not know of his rights and of the material facts which the trustee knew or should have

known; and sub-paragraph (e) specifies a bargain "which was not fair and reasonable." See also, *Restatement of Restitution,* Sec. 191; *Restatement of Agency,* Sec. 390.

Restatement of Restitution, Sec. 55 (b) specifies "justifiable reliance upon an innocent misrepresentation of law by the other"; and comment (c) "Innocent misrepresentation" states that "a person is entitled to rely upon statements of law by those who stand in a confidential relation to him."

4 Pomeroy's Equity Jurisprudence, 5th ed., Sec. 1083 page 1089 states:

> "If a trustee relies on a release or discharge given by the beneficiary it is incumbent upon the trustee to show that he gave the cestui que trust *full information as to all his rights;* and it is, in fact, a part of the trustee's general duty to impart knowledge of his own legal rights to the beneficiary."

3 Pomeroy's Equity Jurisprudence 5th ed., Sec. 953a, page 783, states that:

> "a presumption of invalidity arises from the transaction itself and the burden of proof rests upon . . . the party claiming the benefit of the contract to show affirmatively its perfect fairness, and that a full and adequate consideration was paid."

See also page 784.

Restatement of Restitution, Sec. 11, covering "Assumption of risk of mistake. Compromise", as respects parties generally, even where there is not a fiduciary relationship, points out that "even a specific statement by the parties that the transaction is final does not make it such." Being based upon assumptions that certain facts exist, the transaction will be set aside "if the basic assumptions are not true."

Here, contrary to the view of the Court of Appeals that petitioner's rejection of the solicitations of ambulance chasers tended to relieve defendant of its burden and make petitioner assume the risk of any mistake, the reverse is true. His very rejection of these solicitations evidenced and expressed confidence in and reliance on defendant. Moreover, Barron's representation that he would save money by not hiring an attorney increased defendant's obligation. And, finally, Barron's prevailing on him to discount his claim by the percentage an attorney's fee would amount to, in effect placed defendant additionally in the position of paid counsel for petitioner.

In every aspect of the "settlement" the risk was on defendant that any of the representations by defendant of facts or points of law on which it was based was mistaken or erroneous.

II

Defendant was liable for petitioner's damages, and the District Court correctly held that defendant's representation to the contrary misrepresented the law.

Barron himself testified that he represented to petitioner that in order to recover damages petitioner would have to prove that defendant had notice that Medina was a dangerous character, and that accordingly his case was very "weak" for any recovery beyond $200.00 maintenance. Defendant, however, was liable both under the Jones Act, and for unseaworthiness under the Maritime Law, and the representations by which Barron procured the release, misrepresented the law.

The law, as represented by defendant, requiring "notice" of an employee's incompetence was pre-statutory common law of master and servant applicable on land before the enactment of employers' liability legislation. See, for example, *Fletcher* v. *Baltimore & Potomac R. R. Co.*, 168 U. S. 135 (1897). It has nothing to do with Jones Act liability, or the Maritime Law liability for unseaworthiness. It is based upon the general principle of

common law that anyone is liable for his own negligence; hence, if a master is negligent in selecting or controlling employees, even the common law made such master liable.

By contrast, the Jones Act imposes liability not only for defendant's own negligence, but for the negligence of any of its "officers, agents or employees." Over a century ago, in *United States* v. *Brig Malek Adhel,* 2 How. (43 U. S.) 210, 233 (1844), this court held that where an act of Congress contains several (there five) acts specified as actionable "Either is sufficient" (2 How. 233). And of the Jones Act, this court held, in *Johnson* v. *U. S.,* 333 U. S. 46, 49 (1947), that:

> "While the acts of negligence underlying such accidents may reach higher into the management hierarchy than the one involved here, the Federal Employers' Liability Act compels us to go no higher than a fellow servant".

Assault by an "officer" is criminal under 18 U. S. C. § 2191, formerly 46 U. S. C. § 712; hence it could not be in performance but instead is in violation or "breach" of his authority and duty.

This court has held in *Jamison* v. *Encarnacion,* 281 U. S. 635 (1930) and *Alpha Steamship Corporation* v. *Cain,* 281 U. S. 642 (1930), that since unquestionably inadvertence or carelessness is within the prescribed liability for negligence "it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, *a much graver breach of duty,* was not negligence within the meaning of the Act" (281 U. S. 641).

The murderous assault herein was clearly a willful "*breach of duty*" by Medina as a seaman "employed on" a merchant vessel within 18 U. S. C. § 2196, formerly 46 U. S. C. § 704 which provides:

> "Whoever, being a . . . seaman . . . or other person employed on any merchant vessel, by willful *breach of*

duty . . . does any act . . . tending immediately to endanger the life or limb of any person belonging to or on board of such vessel . . . shall be imprisoned not more than one year".

The murderous assault herein, therefore, was a "breach of duty" by one for whose "breach of duty" defendant was liable under the Jones Act as construed in the *Jamison* (281 U. S. 635), *Cain* (281 U. S. 642) and *Johnson* (333 U. S. 46, 49) cases. Indeed, in *Steeley* v. *Kurn*, 313 U. S. 545 (1941), reversing *Steeley* v. *Kurn*, 347 Mo. 74, 146 S. W. 2d 598, see also *Steeley* v. *Kurn*, 348 Mo. 1142, 157 S. W. 2d 212, this court in effect so held. The Missouri Supreme Court had held defendant not liable where a fellow servant "intentionally, deliberately and maliciously assaulted the plaintiff by 'dropping the rod', thereby seriously injuring him" (347 Mo. 79). This court reversed in a one sentence *per curiam*, citing *Jamison* v. *Encarnacion*, *supra*.

See note discussing "Unprovoked Assaults under the Jones Act", 40 Va. L. Rev. 610-620 (1954).

To hold instead that a "breach of duty" assault by another seaman is not within the Jones Act, in effect eliminates the word "employees" from the Federal statute, and reduces it to the scope of the New York Employers' Liability Act (17A McKinney's Con. Laws) which in § 2, paragraph 2 confines recovery under the State Act to cases of negligence of persons "intrusted with any superintendence or . . . authority to direct, control or command any employee in the performance of the duty of such employee." Compare *Bomba* v. *Borowicz*, 2nd Dept., 265 App. Div. 198 decided under the New York statute.

In addition, here there was also negligence of the Chief Steward and the Captain, to both of whom the incident of the 12th had been reported early on the 13th; many hours before this murderous assault occurred on the night of the 13th. In both aspects, there was Jones Act liability, *i. e.*, for the "breach of duty" act of Medina in committing the

assault, and for the negligence of the Chief Steward and the Captain. Barron's representation to the contrary misrepresented the Jones Act.

The liability for *unseaworthiness,* moreover, is clearly established, and has indeed already been recognized by this Court with reference to this case.

In *Keen* v. *Overseas Tankship Corporation,* 2d. Cir., 194 Fed. 2d 515 (1952), cert. denied, 343 U. S. 966 (1952), on returning from shore leave drunk, and quarreling over seaman Keen's failure to pay second cook Mruczinski a gambling debt, Mruczinski, after being knocked down by Keen with his fist, went to the galley, got hold of a meat cleaver, came back and from behind struck Keen a blow in the head causing him serious injuries (194 Fed. 2d 516). The Court of Appeals in reversing a dismissal and ordering a new trial, applied the warranty of seaworthiness to the member of the crew, Mruczinski, as a warranty that "he is equal in disposition and seamanship to the ordinary men in the calling" (194 Fed. 2d 516).

In *Boudoin* v. *Lykes Bros. Steamship Corp.,* 348 U. S. 336, 99 L. Ed. 296 (1955), this court cited the *Keen* case with approval and applied the principle where a drunken deck maintenance man, Gonzales, going to the room of plaintiff and taking a bottle of brandy from under plaintiff's bed, attacked plaintiff with the bottle when plaintiff awoke startled. This court stated that in such cases the problem is one of degree, the question being

> "Was the assault within the usual and customary standards of the calling? Or is it a case of a seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature?" (348 U. S. 340.)

It cited in a footnote as illustrating situations involving breach of the warranty of seaworthiness by reason of the disposition of a crew member the District Court decision herein, *Thompson* v. *Coastal Oil Company,* 119 F. Supp. 838, and stated that:

"The Court followed the *Keen* case in holding that a crewman who tried to murder one of his fellows with a meat cleaver was not equal in disposition to those of his calling" (348 U. S. 339).

This case is, indeed, stronger than either the *Keen* or *Boudoin* case, in both of which drunkenness was involved. Here, by contrast, the attempted murderer, Medina, was sober, but he was an effeminate pervert; and as the District Court pointed out, although petitioner had reported a perverted act between Medina and Pittaway, Pittaway did nothing in contrast to Medina attempting to murder petitioner (R. 286a). Moreover, in *Keen*, one blow with the meat cleaver was struck. Here Medina struck petitioner three times, not while under the influence of liquor but in deliberately attempted murder.

The principle requiring fit members of the crew, is an old one. The statute respecting unseaworthiness couples "unfit in her crew" in the term "too leaky or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions, or stores" (46 U. S. C. § 653; R. S. § 4556).

The Propeller Niagara v. *Cordes,* 21 How. (62 U. S.) 7, 23 (1858), and *The Southwark,* 191 U. S. 1, 8 (1903), state that a vessel must be provided with a competent crew.

The Rolph, 9th Cir., 299 Fed. 52 (1924), held a vessel unseaworthy by reason of a brutal mate on board.

The Nordpol, 2nd Cir., 84 Fed. 2d 3 (1936) cert. denied, 299 U. S. 586 (1936), held that the deficiency of one crew member unable to speak English rendered the vessel unseaworthy.

Peninsular & Occidental S. S. Co. v. *N. L. R. B.,* 5th Cir., 98 Fed. 2d 411 (1938), held that "A ship that is not manned by a competent crew is unseaworthy".

Similarly, *Texas Co.* v. *N. L. R. B.,* 9th Cir., 120 Fed. 2d 186 (1941), held that the Captain must "weed out" any

crew members who constitute a menace to general discipline or to safe navigation, even where hired by or through unions under contract.

The law thus fully supports the District Court's finding of unseaworthiness, for which defendant was liable in damages. Barron's representation that there was no liability, misrepresented the law.

III

The District Court correctly held the release invalid and the Court of Appeals erred in reversing. Not only is the reversal contrary to the wardship theory of the maritime law; it is more harsh than decisions invalidating releases or other contracts between equals dealing at arm's length.

The case involves not only a failure by defendant to prove that the seaman made the release with a full understanding of his rights; and not only proof by both parties that the seaman *lacked* such full understanding of his rights; but proof by both parties that the seaman was misled and the release procured by representations, which were misrepresentations made by defendant to the seaman of his rights.

The misrepresentations by which Barron procured the release were three-fold:

1. The misrepresentations of the law noted in the preceding point.

2. The representation that petitioner was well and would be able to return to work within three months with only a ten percent permanent disability, has clearly proved to be false. As even the Court of Appeals majority acknowledged, he continued to be disabled and to be

undergoing treatment at the time of the trial, four years later than the settlement. He has been unable to act as cook aboard vessels, and is reduced, when he can get work at all, to serving as dishwasher or utility man. He continues to be in and out of hospitals.

Encephalopathy due to trauma was not mentioned or explained to him in negotiating the settlement (R. 264a).

3. The representation that he would be saving money by settling with defendant without an attorney, and would get as much by allowing the defendant to retain the equivalent of an attorney's fee as he would get if he hired and paid an attorney, was the means not only of inducing petitioner to settle without legal advice but of reducing the settlement, instead of saving any money to petitioner. For petitioner to get as much as though represented by an attorney, defendant would have to represent him as faithfully as would an attorney of his own and pay petitioner what such an attorney would demand. Then the only possible "saving" by not hiring an attorney would be of the attorney's fee. But instead of "saving" this to the seaman, Barron promptly proceeded to deduct and withhold it for defendant. As the District Court pointed out, and Barron acknowledged, this itself was a "substantial" item (R. 267a-268a). And instead of representing petitioner as an attorney would, to get for petitioner his full rights, defendant, by the other representations, deprived petitioner of his rights.

Not only is this contrary to the treatment a seaman is entitled to under *Garrett* v. *Moore-McCormack, supra,* 317 U. S. 239, 247, 248 (1942). It would render invalid a release even were the burden of proof on plaintiff.

In the case of ordinary individuals, including FELA cases of railway employees, the burden is on the one who has executed a release to establish its invalidity, *Callen* v. *Penna. RR. Co.,* 332 U. S. 6, 25 (1948).

Nevertheless, in the *Callen* case (332 U. S. 6), and in other cases subject to the same rule, mistake, misunderstanding or lack of a full understanding of the rights of the parties, and particularly mistake induced by misrepresentation, will establish invalidity.

In *Union Pacific RR Co.* v. *Harris,* 158 U. S. 326 (1895), this court, affirming a judgment for an injured passenger plaintiff, despite a prior release, approved a charge that

> "if there was a misunderstanding of the facts, whether the facts were willfully misstated by the agent of the railway company or not is not a very material question; but the question is whether the facts were understood by both parties; . . . If the settlement was made with a *full understanding of the rights* of the parties . . . he is concluded" (158 U. S. 332, 333). (Italics ours.)

See also *Chesapeake & Ohio RR Co.* v. *Howard,* 178 U. S. 153, 167 (1900). In *Texas & Pacific Ry. Co.* v. *Dashiell,* 198 U. S. 521 (1905), affirming recovery by an injured railway conductor despite a prior release, this court cited and said of the *Harris* case (158 U. S. 326), *supra:*

> "Enough, however, appears to show that the court submitted to the jury the fact of mistake of injuries received as bearing on the effect of the release and this action was affirmed by this court" (198 U. S. 529).

In *Ciletti* v. *Union Pacific RR. Co.,* 2d Cir., 196 Fed. 2d 50 (1952), sustaining a judgment for additional damages to a husband and wife who were injured passengers, despite prior releases for $6,500, the court, quoting from *Scheer* v. *Rockne Motors Corp.,* 2d Cir., 68 Fed. 2d 942, 945 (1934), said:

> "To tell a layman who has been injured, that he will be about in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it

> is ordinarily more than a forecast; it is an assurance as to his present condition, and so understood."

See also the additional decisions cited in the petition herein (pp. 12-19).

The Restatement states the law to this effect. See *Restatement of Restitution*, § 11, particularly Comment c, and Illustrations 6 and 7 under Comment d; *Id.*, § 19 and the definitions of mistake in *Id.*, § 6 and Comments b and c; 2 *Restatement of Contracts*, §§ 500 and 502; 3 *Restatement of Torts*, § 542 (a), (b), (c) and (d), and Comment d under Clause (c). In *Restatement of Restitution*, § 11, Comment d, Illustration 6 states that where "a neutral doctor" examines an injured person and erroneously makes a report later found to be error as to the extent of injury, "It is a question of fact whether or not the transaction was based upon the assumption" of substantially different harm than in fact existed. Under Illustration 7, where *one of the parties* "employs a physician who makes the report" which later proves to be erroneous, "It may be found that even although the parties intended the transaction to be a final settlement of all harm, however extensive", the party who did not employ the physician "is entitled to have the transaction rescinded because of the misrepresentation" (*Id.*, p. 47).

5 *Williston on Contracts, Revised Ed.* § 1500, states:

> "It is not necessary, in order that a contract may be rescinded for fraud or misrepresentation, that the party making the misrepresentation shall have known that it was false. Innocent misrepresentation is sufficient, for though the representation may have been made innocently, it would be unjust to allow one who has made false representations, even innocently, to retain the fruits of a bargain induced by such representations."

Kerr on Fraud and Mistake, 5th Ed. says, at pages 519-520:

> "But where a person obtains a contract or other advantage by mistake or misstatements innocently made, he cannot retain the advantage he has gained when he discovers his mistake. If he does so his innocent misstatement becomes from that moment a deliberate misrepresentation, or in other words fraud."

These principles of mistake, particularly mistake induced by misrepresentation, are also applicable (even in cases subject to the *Callen* case rule of burden of proof) to mistakes (particularly induced mistakes) of *law.* See in this connection, for comparison of mistakes of fact and mistakes of law *Restatement of Restitution,* Topic 3, Introductory Note, pages 180-181, and § 55.

Over a century ago, in *Wheeler* v. *Smith,* 9 How. (50 U. S.) 55 (1850), this court, reversing and overruling a demurrer, held that if the facts alleged were proved, a release for $25,000 (more nearly equivalent to $100,000 or more today) was void for mistake of law induced by representations (which proved to be misrepresentations) of law. Complainant himself had studied law, and believed originally that his uncle's will, cutting him off, and creating a charitable trust, was invalid. But one of his adversaries "in whom the complainant reposed the greatest confidence" gave his "opinion" that the charitable devise "was a legal and valid disposition" (9 How. 81). Recognizing that "From the high character of the executors, no one can impute to them any fraudulent intent in the transaction" and that "they must have acted under a sense of duty", this court held, nevertheless, that the release "under the circumstances, is void" and said:

> "It cannot be sustained on principles which lie at the foundation of a valid contract. The influences oper-

ating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely, and *with a proper understanding of his rights*" (9 How. 83). (Italics ours.)

In accord, and citing that case, it has been held that where a party, "without any coercion upon him", nevertheless is led into a mistake of his legal rights by reliance upon "the representation as to the law governing his case", there is indeed more than mistake of law, the court saying:

> "*But there was here more than a mistake. . . . The defendant must be presumed to have known that it was liable* . . . and by falsely representing . . . the law applicable to the case . . . it induced the plaintiff to rely upon the superior knowledge that it possessed upon the subject and to surrender to it his claim." (Italics ours.)

Berry v. *American Central Ins. Co.*, 132 N. Y. 49, 54 (1892);

Hudson v. *Glens Falls Ins. Co.*, 218 N. Y. 133, 139 (1916).

To same effect, *Titus* v. *Rochester German Ins. Co.*, 97 Ky. 567, 570-571 (1895).

See also: *Camerlin* v. *New York C. R. R. Co.*, 1st Cir., 199 F. 2d 698 (1952), discussed in the petition, pages 17-18.

The Restatement states the law to this effect, in addition to asserting that there is little if any difference between the effect of mistake of law and mistake of fact. See: *Restatement of Restitution*, § 55 (a) and (b), particularly Comment b entitled "Fraud" and Comment e entitled "Innocent misrepresentation", and Topic 3, Introductory Note, pages 180-181. See also: 2 *Restatement of Contracts*, §§ 474, 500, 502; 3 *Restatement of Torts*, § 545, particularly Comment d.

Accordingly, even were this a case subject to the *Callen* case rule, the release would be clearly invalid. Since it is controlled instead by *Garrett* v. *Moore-McCormack Co., supra,* 317 U. S. 239, the erroneous ruling of the Court of Appeals herein is revolutionary in its comparative harshness to the seaman.

IV

Unseaworthiness, mistake, misrepresentation, and invalidity of the release, were all questions of fact determined by the District Court in petitioner's favor. Under rule 52 the findings and judgment could not be set aside because not clearly erroneous.

McAllister v. *U. S.*, 348 U. S. 19 (1954), establishes that in a seaman's case the question in both the Court of Appeals and this Court as to findings respecting liability by the District Court is "whether the findings of the District Court are clearly erroneous" (348 U. S. 20-21).

The issue of unseaworthiness (or seaworthiness) is an issue of fact, and its determination is a finding of fact (*Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, 98 (1944); *Luckenbach* v. *W. J. McCahan Sugar Refining Co.*, 248 U. S. 139, 145 (1918); *W. J. McCahan Sugar Refining Co.* v. *S. S. Wildcroft*, 201 U. S. 378, 387 (1906); *The Carib Prince*, 170 U. S. 655, 658 (1898); *Steel* v. *State Line S. S. Co.*, L. R. 3 App. Cas. 72, 81, 82, 84, 86, 90, 91). *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336, 99 L. ed. Advance ops. 296 (1955) applies this in holding in an assault case:

> "We think the record does not warrant rejection of the District Court's findings and that the findings warrant recovery for breach of the warranty of seaworthiness" (348 U. S. 338).

In *Callen* v. *Penna. RR. Co.*, 332 U. S. 625 (1948); *Dice* v. *Akron, Canton and Youngstown RR. Co.*, 342 U. S. 359

(1952); *Union Pacific Railway Co.* v. *Harris*, 158 U. S. 326 (1895), and *Chesapeake & Ohio Railway Co.* v. *Howard*, 178 U. S. 153, 167 (1900), the questions of mistake, misrepresentation and resulting invalidity of a release, were held to be questions of fact.

Under Rule 52, Federal Rules of Civil Procedure, determinations of fact by the District Court cannot be reversed unless clearly erroneous. And "the Court of Appeals may not set aside the judgment below unless it is clearly erroneous" (*McAllister* v. *U. S.*, *supra*, 348 U. S. 19, 20).

The Court of Appeals' reversal herein does not purport to determine that any of the findings were clearly erroneous, nor even to question the findings, except in erroneously treating the question of the validity of the release as a question of law controlled by its theory as to "coercion" and "misrepresentation" (viewed apparently as confined to intentionally fraudulent misrepresentation). It does not even treat of the theory of mistake, misrepresentation and resulting invalidity set forth by the District Court.

Under the above cited authorities the evidence herein fully supports the District Court findings and judgment, they are not clearly erroneous, and the reversal was error.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed and the judgment of the District Court reinstated and affirmed.

Respectfully submitted,

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